



The Kansas Workers Compensation Fund (Fund) requests Appeals Board review of the following issues:

- (1) The extent, if any, of the liability of the Kansas Workers Compensation Fund;
- (2) If the Fund is found liable for any of the benefits and costs of this case, the Fund questions its liability for the expenses of Dr. P. Brent Koprivica's report and deposition; any medical expenses that exceed \$8,880.79 and the expense of Terrill & Associates for a report in the amount of \$936.00.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the evidentiary record, considering the briefs and arguments of the parties, the Appeals Board finds as follows:

(1) The respondent and the claimant settled her claim for compensation on April 7, 1994 before Special Administrative Law Judge David J. Wood. The claimant received a lump sum settlement in the amount of \$7,500.00 which represented a permanent partial disability of approximately 12 percent. Claimant was injured while working for the respondent on August 3, 1992 and October 13, 1992. All authorized medical expenses were agreed to be paid by the respondent to the date of the settlement. The Fund was represented by counsel at the settlement hearing and agreed that the settlement was fair and reasonable. All other issues between the respondent and the Fund were reserved for future determination.

After evidentiary depositions were taken of the claimant, Teresa Owens; Luella Weems, administrator for the respondent; and P. Brent Koprivica, M.D., the case was submitted to the Administrative Law Judge for a decision. The Administrative Law Judge, in his Award of July 10, 1995, assessed 60 percent of the Award to be paid by the Fund and 40 percent to be paid by the respondent. The Fund argues that it has no liability because claimant violated her work restrictions after she was injured on August 3, 1992 and returned to work for the respondent. It is the Fund's position that the Fund cannot be liable when the claimant admittedly worked outside her permanent work restrictions. The Fund further argues that if it does have any liability, that its liability is limited to Dr. Koprivica's opinion that 40 percent of claimant's total disability for both accidents is related to the second accident which occurred on October 13, 1992.

After a review of the evidentiary record, the Appeals Board finds that claimant's testimony established that prior to claimant's first accident of August 3, 1992, claimant did not have a preexisting impairment which constituted a handicap in her obtaining or retaining employment. Therefore, in order to shift a portion of its liability to the Fund, the respondent has the burden to establish that claimant became a handicapped employee as a result of the August 3, 1992 accident and was retained by the respondent with knowledge of the handicap. *Spencer v. Daniel Constr. Co.*, 4 Kan. App. 2d 613, 619, 609 P.2d 687, rev. denied 228 Kan. 807 (1980). The Appeals Board finds that respondent established through both Luella Weems' and Dr. Koprivica's testimony that after claimant's first accident, and before her second accident, October 13, 1992, respondent returned claimant to work with the knowledge that she had a permanent physical impairment that

constituted a handicap in obtaining and retaining employment. See K.S.A. 44-566(b) and K.S.A. 1992 Supp. 44-567(b).

The narrow question that remains to be answered in reference to Fund liability is the extent claimant's preexisting impairment contributed to her second injury of October 13, 1992. Since the claimant did not have any permanent impairment prior to her first injury, the Fund is only responsible for the second injury and the Fund's responsibility is limited to the extent claimant's preexisting impairment contributed to the second injury. See Brozek v. Lincoln County Highway Dept., 10 Kan. App. 2d 319 Syl. ¶ 3, 698 P.2d 392 (1985). The respondent presented the testimony of Dr. P. Brent Koprivica on this question. The Administrative Law Judge found from Dr. Koprivica's testimony that 60 percent of claimant's current disability related back to the first accident in August 1992 and 40 percent to the second accident in October 1992. The respondent agrees with this analysis and urges the Appeals Board to affirm the Administrative Law Judge's Award in this regard. The Fund asserts that any liability that it has in this case must be limited to the second accident or 40 percent.

Dr. P. Brent Koprivica examined the claimant on June 15, 1994 at the request of the respondent for purpose of assessing Fund liability. Dr. Koprivica testified that 60 percent of claimant's overall current functional impairment was attributed to her first injury, August 3, 1992, and 40 percent of claimant's permanent impairment was attributed to her second injury, October 13, 1992. When asked to assign an impairment rating to the August 3, 1992 injury, Dr. Koprivica opined that 6 percent related to this injury and 4 percent related to claimant's second injury of October 13, 1992 for a total of 10 percent for both injuries. The Appeals Board finds that this opinion simply assigns an impairment rating value to each of the two separate injuries. At this point, Dr. Koprivica did not answer the important questions in reference to Fund liability of whether claimant's disability after her second injury would not have occurred but for her preexisting impairment or whether claimant's resulting disability would have occurred without regard to her preexisting impairment but was contributed to by her preexisting impairment. See K.S.A. 1992 Supp. 44-567(a)(1),(2).

The Appeals Board finds from taking Dr. Koprivica's testimony as a whole that the testimony established that claimant's resulting disability after the second accident, October 13, 1992, would not have occurred but for claimant's preexisting impairment. Dr. Koprivica opined that as a result of claimant's August 3, 1992 injury, she suffered permanent impairment. He testified that after the claimant returned to work and performed her regular duties, after a brief session on light duty, she then suffered an aggravation of her injury on October 13, 1992. Dr. Koprivica opined that claimant's first injury of August 1992 made claimant pre-disposed, or more likely, to suffer further aggravating injury. Accordingly, the Appeals Board finds that but for the claimant's previous impairment sustained in the accident of August 3, 1992 claimant's resulting disability after the second accident probably would not have occurred. Therefore, the Appeals Board finds that the Fund is liable for all of the second injury which is 40 percent of the total disability and should be responsible for 40 percent of the total benefits and costs incurred in this case.

(2) The Fund also argues that if it is found liable for any portion of the benefits and costs paid in this case, it is only responsible for the medical expenses stated in the settlement hearing of April 7, 1994 in the amount of \$8,880.79 and not the medical expenses requested before the Administrative Law Judge of \$9,023.33. The Fund goes on to contend that it has no responsibility for the costs of Dr. Koprivica's examination, report, deposition and subsequent court reporting fee for his deposition. Additionally, the

Fund questions its liability for any expense paid to Terrill & Associates for a work disability report requested by the respondent.

The Appeals Board has analyzed these questioned expenses that are contained in the record and finds that the Fund should not be responsible for any of the expenses associated with Dr. Koprivica's examination, report, deposition and court reporter fees for his deposition. Dr. Koprivica was hired by the respondent after the claimant and respondent settled her claim for the sole purpose to present evidence on Fund liability. The amount of these expenses total \$1,070.40.

In reference to the additional medical expenses for which the respondent is requesting reimbursement by the Fund, the Appeals Board finds that the additional expenses of \$142.54 that exceed the \$8,880.79 amount of medical expenses paid by the respondent at the settlement hearing are authorized medical expenses and the Fund should pay its apportioned share.

The Appeals Board further finds that the \$936.00 expense incurred by the respondent for a work disability opinion from Terrill & Associates is an appropriate expense for the Fund to pay its apportioned share. The settlement hearing transcript showed that this report was used as one of the basis to settle the case with claimant.

#### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated July 10, 1995 should be, and is hereby, modified to assess 40% of all benefits and costs accrued in this matter against the Kansas Workers Compensation Fund and 60% against the respondent and its insurance carrier, except as to those expenses that are specifically set forth above.

All other orders of the Administrative Law Judge in his Award are herein adopted by the Appeals Board.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of March 1996.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: M. Doug Bell, Coffeyville, KS  
David J. Bideau, Chanute, KS  
John D. Clark, Administrative Law Judge

**TERESA OWENS**

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**DOCKET NO. 179,942**

Philip S. Harness, Director